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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

ROBERT MENDOZA et al., Plaintiffs and Appellants, v. LOS ANGELES DEPARTMENT OF WATER AND POWER, Defendant and Respondent.	B204796 (Los Angeles County Super. Ct. No. BC364456)

APPEAL from a judgment of the Superior Court of Los Angeles County. Haley J. Fromholz, Judge. Affirmed.

Law Offices of Santiago Rodnunsky & Jones, David G. Jones and Tamara S. Fong for Plaintiffs and Appellants.

Rockard J. Delgadillo, City Attorney, Richard M. Brown, General Counsel for Water and Power and Wendy K. Genz, Deputy City Attorney, for Defendant and Respondent.

* * * * * *

Appellants Robert Mendoza (Mendoza) and Xavier Martinez (Martinez), who are Hispanic, sued their employer, respondent Los Angeles Department of Water and Power (LADWP), for discrimination based on national origin and retaliation under the Fair Employment and Housing Act (Gov. Code, § 12900 et seq.) (FEHA), when they were denied promotion to a higher pay grade level. Appellants had two theories of discrimination: disparate impact and disparate treatment. The trial court sustained without leave to amend LADWP's demurrer to appellants' claim for discrimination based on disparate impact, and later granted LADWP's motion for summary judgment on the remaining causes of action for discrimination based on disparate treatment and retaliation.

Appellants contend that the trial court abused its discretion by denying them leave to amend their disparate impact claim. They also contend that they created triable issues of material fact on their disparate treatment claim and that they established a prima facie case of retaliation. We disagree and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Factual Background

In the early 1980's, appellants began working in the engineering section of LADWP. By the end of 2004, after having already been promoted several times, appellants were classified as principal civil engineering drafting technicians (PCEDT), the highest level in their subfield. In the PCEDT classification, there are two pay grades, with "A" being the higher grade. Appellants had been promoted to PCEDT "B" in 2001, and Mendoza did not find that promotional process to be unfair. They worked in Distribution Information Technology (DIT), which consisted of several groups; Martinez worked in Computer Graphics and Mendoza worked in Computer Applications, eventually transferring to Computer Graphics in 2004.

As of December 31, 2004, two PCEDT "A" positions existed in the power side of LADWP's organization—one in Distribution Drafting, occupied by David Bannon, and one in DIT, occupied by Clifford Higa. There were three PCEDT "B"s: Tom Casey,

who was Caucasian in Distribution Drafting, and appellants in DIT. Bannon supervised Distribution Drafting and reported to Jack Feldman. Chin Chang supervised the Computer Applications group of DIT and Fernando Pardo supervised the Computer Graphics group of DIT. Chang and Pardo both reported to Group Manager Ali Morabbi. Feldman and Morabbi reported to Director of Engineering and Support Services Kent Noyes.

When Bannon retired effective January 1, 2005, Casey, who had worked as Bannon's assistant for the past four years and who had spent the majority of his career at LADWP in the drafting room, was temporarily appointed to Bannon's "A" position pursuant to Article 33 of the Memorandum of Understanding (MOU) of the appellants' union. A bid notice to permanently fill the vacancy was posted in June 2005. Mendoza and Casey were the only two candidates. Although eligible, Martinez did not apply for the position because he was more interested in Clifford Higa's position. Interviews took place on July 28, with Morabbi and manager Marvin Moon acting as the raters. At the conclusion of the interviews, Casey ranked higher with a score of 97 and Mendoza ranked second with a score of 92. Consistent with LADWP practice and policy, Casey received the promotion as the highest ranking candidate.

Clifford Higa, who was the other PCEDT "A" in Computer Graphics, retired effective February 1, 2005. Prior to his retirement, Higa consulted with outside consultants, including a company called Intergraph, which had had several contracts with LADWP over the years. Higa returned to work at LADWP in July 2005 as a subcontractor of Intergraph, but his work at LADWP ended a year later when the LADWP contract with Intergraph expired on June 30, 2006. Higa's PCEDT "A" position has never been filled.

On July 8, 2005, Martinez met with Kent Noyes to discuss management's decision not to "backfill" Higa's position. During this meeting, Noyes showed Martinez a proposed organizational chart prepared by Casey in May (which Martinez had already seen) and explained management's intent to move the responsibilities of both PCEDT "B" positions into Distribution Drafting. That same day, Casey sent an e-mail to

appellants stating he believed that both of them would soon be required to move to Distribution Drafting. Sometime after October 3, 2005 Mendoza moved into Distribution Drafting and into the office previously occupied by Dave Bannon. Martinez was again informed around October 2005 that he would be moved into Distribution Drafting, but no such move took place.

On September 28, 2005, appellants' union filed a grievance on behalf of Mendoza with the Joint Labor/Management Investigatory Committee (JLMIC) claiming that the promotion of Tom Casey was biased. On October 31, 2005, the union filed another grievance on behalf of both appellants claiming the decision not to backfill Clifford Higa's position was discriminatory. A year later, in September 2006, the JLMIC determined that it was unable to resolve Mendoza's original grievance, and as of the date of the summary judgment motion had made no decision on the second grievance. Both appellants filed charges of discrimination and retaliation with the Department of Fair Employment and Housing (DFEH) on January 4, 2006 and received notices of case closure on January 10, 2006.

Procedural History

Appellants filed a first amended complaint (FAC) against LADWP alleging three causes of action under FEHA for: (1) national origin discrimination based on disparate treatment, (2) national origin discrimination based on disparate impact, and (3) retaliation. LADWP demurred to the second cause of action for discrimination based on disparate impact on the grounds that appellants had failed to exhaust their administrative remedies and had failed to state facts sufficient to support a discrimination claim based on disparate impact. The trial court found that appellants had exhausted their administrative remedies, but concluded that the FAC's allegations amounted to a claim for discriminatory treatment, rather than discriminatory impact. At the hearing on the demurrer, appellants' attorney argued that the FAC could be amended to cure the defect, but the court found that the proposed allegations were merely "describing a disparate treatment cause of action," and sustained the demurrer without leave to amend. The court

denied appellants' motion for reconsideration on the grounds that it was procedurally deficient and failed to attach a proposed amended complaint.

LADWP subsequently filed a motion for summary judgment, arguing that there was no evidence from which a trier of fact could infer discriminatory treatment because LADWP had offered a legitimate business reason for its actions and there was no evidence of pretext, and that the retaliation cause of action failed as a matter of law. Appellants opposed the motion, arguing they had both direct and circumstantial evidence that created triable issues of material fact as to their discrimination claim, and that they established a prima facie case of retaliation. Along with its reply brief, LADWP filed numerous objections to appellants' evidence.

The trial court sustained LADWP's evidentiary objections, and granted the motion for summary judgment, setting forth its reasons in an 18-page order. Judgment was entered in favor of LADWP. This appeal followed.

DISCUSSION

I. Demurrer

Appellants contend that the trial court abused its discretion in denying them leave to amend their second cause of action for discrimination based on disparate impact when sustaining LADWP's demurrer. Appellants are correct that a request for leave to amend and the showing necessary to cure the defects may be made for the first time on appeal. (Code Civ. Proc., § 472c, subd. (a); *Rakestraw v. California Physicians' Service* (2000) 81 Cal.App.4th 39, 43.) But to satisfy the burden on appeal of showing a reasonable possibility that an amendment will cure the defects, an appellant must not only set forth the legal basis for amendment, but "'must show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading.'" (*Rakestraw, supra*, at p. 43, quoting *Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349.) The plaintiff must set forth factual allegations that sufficiently state all required elements of the challenged causes of action, and the allegations "must be factual and specific, not vague or conclusionary." (*Rakestraw, supra,* at pp. 43, 44.) "Where the appellant offers

no allegations to support the possibility of amendment and no legal authority showing the viability of new causes of action, there is no basis for finding the trial court abused its discretion when it sustained the demurrer without leave to amend." (*Id*. at p. 44.)

"'To prevail on a theory of disparate impact, the employee must show that regardless of motive, a facially neutral employer practice or policy, bearing no manifest relationship to job requirements, in fact had a disproportionate adverse effect on certain employees because of their membership in a protected group.'" (*Frank v. County of Los Angeles* (2007) 149 Cal.App.4th 805, 817.)[1]

The FAC did not identify any facially neutral practice or policy. Appellants assert on appeal that they can cure this defect by alleging the following: "Numerous specific policies, (including but not limited to 'Interviewing and Selecting the Best Person') (supervisory guidelines for interview and selection), Administrative Manual Selection Process, all facially neutral, exist which have served to create a disparate impact upon the plaintiffs with respect to their promotional opportunities, both the specific promotional opportunities referenced herein as well as multiple additional promotional opportunities which were never opened to the plaintiffs to allow for application over the course of their employment. These policies also include, but are not limited to, LADWP Memorandums of Understanding applying to Plaintiffs, LADWP bid process policies relating to Plaintiffs' promotional opportunities, LADWP selection criteria policies and procedures for promotional candidates, internal LADWP procedures relating to the rules for the interview process relating to Plaintiffs' promotional opportunities, as well as many related documents in this regard, all of which the LADWP contends are facially neutral."

But these proposed allegations do not assert that LADWP's promotional practices affected Hispanics as a group, only that two Hispanic drafting technicians were adversely

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[1] Disparate impact discrimination has been recognized as actionable under both FEHA and Title VII of the Civil Rights Act of 1964 (Title VII) (42 U.S.C. § 2000e et seq.). (*Carter v. CB Richard Ellis, Inc*. (2004) 122 Cal.App.4th 1313, 1321.) "Because of the similarity between state and federal employment discrimination laws, California courts look to pertinent federal precedent when applying our own statutes." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 354.)

affected because two out of the three PCEDT "B"s that were eligible for but denied promotion to PCEDT "A" positions were Hispanic. Such allegations do not state a disparate impact claim. "'[T]he mere fact that each person affected by a practice or policy is also a member of a protected group does not establish a disparate impact.'" (*Frank v. County of Los Angeles, supra,* 149 Cal.App.4th at pp. 818–819, citing *Carter v. CB Richard Ellis, Inc., supra,* 122 Cal.App.4th at p. 1324.) Rather, the allegations essentially allege that the purported neutral manuals and guidelines have been applied in such a way as to prevent *appellants* from being promoted. As the trial court noted, this is a classic disparate treatment allegation, not a disparate impact allegation.

Appellants also assert that following the trial court's ruling on the demurrer, they gathered evidence through discovery that "although LADWP's bidding process of putting promotional opportunities 'out for bid' appears to be a facially neutral practice, it was revealed during the course of the litigation that in fact there were several subjective decisions made in ultimately eliminating the possibilities for promotion which disparately impacted persons of Hispanic origin." But this assertion is too vague to meet appellants' burden on appeal of setting forth allegations that are "factual and specific, not vague or conclusionary." (*Rakestraw v. California Physicians' Service, supra,* 81 Cal.App.4th at p. 44.) While the United States Supreme Court has held that subjective hiring practices can form the basis of a disparate impact claim, appellants must still identify the specific employment practices allegedly responsible for the disparate impact. (*Watson v. Fort Worth Bank & Trust* (1988) 487 U.S. 977, 991, 994.) "Our disparate-impact cases have always focused on the impact of *particular* hiring practices on employment opportunities for minorities. Just as an employer cannot escape liability under Title VII by demonstrating that, 'at the bottom line,' his work force is racially balanced (where particular hiring practices may operate to deprive minorities of employment opportunities), [citation], a Title VII plaintiff does not make out a case of disparate impact simply by showing that, 'at the bottom line,' there is racial *imbalance* in the work force. As a general matter, a plaintiff must demonstrate that it is the application of a

specific or particular employment practice that has created the disparate impact under attack." (*Wards Cove Packing Co. v. Atonio* (1989) 490 U.S. 642, 656–657.)

We find no abuse of discretion in the trial court's denial of leave to amend the FAC's disparate impact claim.[2]

II. Summary Judgment

A. Standard of Review

A summary judgment motion "shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).) To be entitled to judgment as a matter of law, the moving party must show by admissible evidence that the "action has no merit or that there is no defense" thereto. (Code Civ. Proc., § 437c, subd. (a).) A defendant moving for summary judgment meets this burden by presenting evidence demonstrating that one or more elements of the cause of action cannot be established or that there is a complete defense to the action. (Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 849–850, 853–854.) Once the defendant makes this showing, the burden shifts to the plaintiff to show that a triable issue of material fact exists as to that cause of action or defense. (Code Civ. Proc., § 437c, subd. (p)(2); see *Aguilar, supra*, at p. 850.) When reviewing a summary judgment, we strictly construe the moving party's affidavits and liberally construe those of the opposing party. We accept as undisputed facts only those portions of the moving party's evidence that are not contradicted by the opposing party's evidence. (*Arteaga v. Brink's, Inc.* (2008) 163 Cal.App.4th 327, 341–342 (*Arteaga*).) Evidence to which objections have been made and sustained is not considered. (*Yanowitz v. L'Oreal USA, Inc*. (2005) 36 Cal.4th 1028, 1037 (*Yanowitz*).) Because we review a summary judgment de novo, we are not

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[2] In light of our conclusion, we need not address LADWP's contention that the trial court erred in finding that appellants exhausted their administrative remedies.

bound by the trial court's stated reasons or rationales. (*Horn v. Cushman & Wakefield Western, Inc.* (1999) 72 Cal.App.4th 798, 805.)

B. Disparate Treatment Discrimination

Under a disparate treatment theory of discrimination, as opposed to a disparate impact theory, discrimination occurs "'when the employer "treats some people less favorably than others because of their race, color, . . . or national origin." [Citations.] "[T]he plaintiff must prove the ultimate fact that the defendant engaged in intentional discrimination. [Citations.] An employer will be liable for intentional discrimination if it is shown that its employment decision was premised upon an illegitimate criterion."'" (*Frank v. County of Los Angeles*, *supra*, 149 Cal.App.4th at p. 822.)

"Under well-settled rules of order of proof, the employee must first demonstrate a prima facie showing of prohibited discrimination. If the employee does so, the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for its action. The employee then has the burden of proving the proffered justification was a pretext for discrimination." (*Nelson v. United Technologies* (1999) 74 Cal.App.4th 597, 613.) However, because in the context of summary judgment the employer must bear the initial burden of showing that the action has no merit and the employee will not be required to respond unless that burden is met, the traditional burden of production in an employment discrimination case "is reversed" on summary judgment. (*Arteaga*, *supra*, 163 Cal.App.4th at p. 344; *Nelson v. United Technologies*, *supra*, at p. 613.) "'"In such pretrial [motion] proceedings, the trial court will be called upon to decide if the plaintiff has met his or her burden of establishing a prima facie case of unlawful discrimination. If the employer presents admissible evidence either that one or more of plaintiff's prima facie elements is lacking, or that the adverse employment action was based on legitimate, nondiscriminatory factors, the employer will be entitled to summary judgment *unless the plaintiff produces admissible evidence which raises a triable issue of fact material to the defendant's showing*."'" (*Arteaga*, *supra*, at p. 344.)

Nevertheless, the "ultimate burden of persuasion on the issue of actual discrimination remains with the plaintiff" at all times. (*Guz v. Bechtel National, Inc., supra,* 24 Cal.4th at p. 356.) """The ultimate question is whether the employer intentionally discriminated, and proof that 'the employer's proffered reason is unpersuasive, or even obviously contrived, does not necessarily establish that the *plaintiff's* proffered reason . . . is correct.' . . . In other words, '[i]t is not enough . . . to disbelieve the employer; the factfinder must believe the plaintiff's explanation of intentional discrimination.' . . . """ (*Arteaga, supra,* 163 Cal.App.4th at p. 343.)

The burden-shifting analysis does not apply when a plaintiff produces direct evidence of discrimination. (*Trop v. Sony Pictures Entertainment, Inc*. (2005) 129 Cal.App.4th 1133, 1144–1145.) In such an instance, "'the defendant can avoid liability only by proving the plaintiff would have been subjected to the same employment decision without reference to the unlawful factor.'" (*Id*. at p. 1145.)

1. Prima Facie Case

To prove a prima facie case of discrimination in the failure to receive a promotion, the plaintiff must either offer direct evidence of discriminatory intent, or establish a presumption of discrimination by showing: (1) that he is a member of a protected class, (2) that he applied and was qualified for the position, and (3) that such position was ultimately filled by someone not a member of the protected class. (*Texas Dept. of Community Affairs v. Burdine* (1981) 450 U.S. 248, 254; *Guz v. Bechtel National, Inc., supra*, 24 Cal.4th at p. 355, fn. 21.) "'The showing the plaintiff must make as to the elements of the prima facie case in order to defeat a motion for summary judgment is *de minimis*.'" (*Sutera v. Schering Corp.* (2d Cir. 1995) 73 F.3d 13, 16.)

It is undisputed that both Mendoza and Martinez are of Hispanic origin, that they were both qualified for the higher paying PCEDT "A" position, and that Mendoza applied for and was denied the position, which was awarded to Tom Casey, a Caucasian. Martinez, however, did not apply for the position. Although he admitted that he was aware of the bid posting for the PCEDT "A" position in Distribution Drafting, he chose

not to apply because he was more interested in Clifford Higa's position in Computer Graphics. The trial court therefore properly concluded that Martinez's failure to compete for promotion to the "A" position in 2005 precludes him from claiming that he was discriminated against based on any failure to receive a promotion to PCEDT "A" in Distribution Drafting. Thus, any alleged discrimination against Martinez would be limited to LADWP's decision not to backfill Higa's position. The question now becomes whether LADWP produced evidence of legitimate nondiscriminatory reasons for its decisions.

2. LADWP's Legitimate, Nondiscriminatory Factors

With respect to the decision to promote Tom Casey instead of Mendoza to the PCEDT "A" position in Distribution Drafting, LADWP presented evidence that the decision was consistent with its department policy of promoting the highest ranking candidate. The evidence showed that the decision was based upon the interviewers' assessment of Casey's and Mendoza's performance in the interviews, and there is no evidence that the raters, Moon and Morabbi, harbored any discriminatory animus. The employer's reasons "need not necessarily have been wise or correct"; they need only be "facially unrelated to prohibited bias." (*Guz v. Bechtel National, Inc., supra*, 24 Cal.4th at p. 358, italics omitted.)

LADWP also proffered a legitimate, nondiscriminatory reason for the decision not to open to bid Clifford Higa's vacated position. LADWP presented evidence demonstrating that it had always been the intention of Engineering Services management that, once the intelligent maps system had been developed, the responsibility for maintaining the intelligent drawings would revert back to the drafting room. At the time of Higa's retirement, the development of the intelligence behind the map sets had been essentially complete, and most of the remaining work involved converting the existing drawings to the new format. Higa's retirement provided a timely opportunity to transition the work to the drafting room. LADWP also presented evidence that it was Noyes's desire to move away from the in-house system that had been in place and replace

it with a commercial system. With the responsibility of maintaining intelligence map sets reverting back to Distribution Drafting, Engineering Services management believed two assistants at the PCEDT "B" level were justified. Noyes believed that appellant Martinez had the perfect qualifications to become the assistant in charge of the intelligent map set group and that he should be moved into that position. Noyes also believed appellant Mendoza was well qualified to act as the assistant in charge of the standard maps, and that the Computer Applications Group could maintain the existing maps and records system and implement a new system, and Mendoza was transferred to the drafting room.

An employee's disagreement with management's decision does not create a triable issue of fact. (*Hersant v. Department of Social Services* (1997) 57 Cal.App.4th 997, 1005 [a factual dispute as to whether the employer's decision was wrong, imprudent or mistaken does not defeat summary judgment].) """While an employer's judgment or course of action may seem poor or erroneous to outsiders, the relevant question is . . . whether the given reason was a pretext for illegal discrimination. The employer's stated legitimate reason . . . does not have to be a reason that the judge or jurors would act on or approve."""" (*Arteaga, supra,* 163 Cal.App.4th at p. 344.)

3. Pretext

Appellants contend they presented both direct and circumstantial evidence of a pretext for illegal discrimination sufficient to create a triable issue of fact of the actual motivation of LADWP. We disagree.

a. Direct Evidence

A plaintiff can prove pretext directly by showing that unlawful discrimination more likely than not motivated the employer. (*Raad v. Fairbanks North Star Borough School Dist.* (9th Cir. 2003) 323 F.3d 1185, 1194.) Direct evidence often consists of remarks made by decisionmakers displaying bias or motive. (*Godwin v. Hunt Wesson, Inc*. (9th Cir. 1998) 150 F.3d 1217, 1221.)

Appellants contend that they produced direct evidence of pretext through the declaration of Victor Perez, an electrical engineer with LADWP, in which he stated: "Paul Samuels, a co-employee, advised me that he overheard managers Kent Noyes and Jack Feldman stating that when they retire or left the [LADWP], they wanted to leave a legacy of white managers." The trial court sustained LADWP's objections to the admissibility of this statement pursuant to Evidence Code section 1200 on the ground that it was double hearsay. Appellants argue that the trial court abused its discretion in finding the statement to be inadmissible.

Because the statement involves multiple levels of hearsay, appellants must establish that each level satisfies a hearsay exception in order for the entire statement to be admissible. (Evid. Code, § 1201; *Cruey v. Gannett Co*. (1998) 64 Cal.App.4th 356, 366.) Thus, appellants had the burden of laying a foundation for the statement by each declarant—Noyes, Feldman, Samuels and Perez. Appellants have failed to do so.

Ignoring Feldman, appellants assert that "the statement attributed to Noyes is independently admissible either as a party admission or as evidence of intent." But appellants fail to cite any relevant authority supporting their assertion. We do not consider arguments for which no authority is cited. (*Dabney v. Dabney* (2002) 104 Cal.App.4th 379, 384.) Appellants also assert that Noyes's statement is "a general pronouncement of LADWP policy." But appellants provide no evidence that Noyes had authority to speak on behalf of LADWP when he allegedly made this statement. Nor does the statement attributed to Noyes purport to describe a department-wide policy. Appellants also failed to provide evidence as to the context in which the statement was made, when it was made or whether it was made contemporaneous with or related to the decision not to backfill Higa's position. Direct evidence is evidence which proves a fact without inference or presumption. (*Trop v. Sony Pictures Entertainment, Inc.*, *supra*, 129 Cal.App.4th at p. 1145.) To rise to the level of direct evidence of discrimination, isolated comments must be contemporaneous with or related to the decisionmaking process at issue. (*Id*. at p. 1147.)

Appellants further argue that the statement is not being asserted for the truth of the matter, but for its effect on the listener and to show that a culture of discrimination existed. But, contrary to their assertion, appellants are clearly seeking to use the statement to prove the truth of the matter asserted, i.e., discriminatory intent. Moreover, to be admissible as "state of mind" evidence, it must be shown that the statement was made under circumstances indicating that it is reasonably trustworthy. (*People v. Lew* (1968) 68 Cal.2d 774, 779.) No such showing was made here.

Finally, as the trial court noted, even assuming the initial statement by Noyes was admissible as an admission, appellants have made no showing whatsoever that the statements by Samuels and Perez are admissible as hearsay exceptions. We find no abuse of discretion in the trial court's decision not to admit the statement.

b. Circumstantial Evidence

In those cases where direct evidence is unavailable, "the plaintiff may come forward with circumstantial evidence that tends to show that the employer's proffered motives were not the actual motives because they are inconsistent or otherwise not believable." (*Godwin v. Hunt Wesson, Inc., supra,* 150 F.3d at p. 1222.) Whereas direct evidence of pretext may be slight, circumstantial evidence of pretense must be "specific" and "substantial" in order to create a triable issue with respect to whether the employer intended to discriminate. (*Ibid*.) Appellants claim they presented several instances of circumstantial evidence from which an inference of pretext can be made.

First, appellants point to their attorney's declaration which attached an e-mail written by Eileen Lau, whom appellants describe as "a highly placed administrative supervisor," in which she stated that Ali Morabbi informed her that "drafting personnel come into his group to work on specific power systems projects. . . . Cliff Higa was specifically brought into [Control & Business Systems] to work on the CADD and GIS projects. There is no need to backfill his position since his work has been completed and the systems are now operational." Appellants argue that this e-mail, along with deposition testimony from LADWP employees Tom Casey and Fernando Pardo,

purportedly stating that Higa's work had not been completed and the systems were not operational, reveals that the reasons LADWP proffers for its decision not to backfill Higa's position are false. Curiously, appellants' opening brief largely ignores the fact that the trial court ruled that both Lau's e-mail and Casey's deposition testimony relied on by appellants was inadmissible. Appellants' opening brief does not present any arguments that the trial court abused its discretion in ruling that this evidence was inadmissible.[3] We reiterate that on a motion for summary judgment, only admissible evidence is properly considered by the court. (*Rickel v. Schwinn Bicycle Co.* (1983) 144 Cal.App.3d 648, 662.) Moreover, Pardo's deposition testimony does not assist appellants because while Pardo testified that the entirety of Higa's work was not completed, he also testified that such a statement did not tell the whole story because some systems were operational and some were not.

In any event, as our Supreme Court has explained, "an inference of intentional discrimination cannot be drawn solely from evidence, if any, that the company lied about its reasons. The pertinent statutes do not prohibit lying, they prohibit discrimination. [Citation.] . . . . [T]here must be evidence supporting a rational inference that *intentional discrimination, on grounds prohibited by the statute, was the true cause* of the employer's actions. [Citation.] Accordingly, the great weight of federal and California authority holds that an employer is entitled to summary judgment if, considering the employer's innocent explanation for its actions, the evidence as a whole is insufficient to permit a rational inference that the employer's actual motive was discriminatory." (*Guz v. Bechtel National, Inc.*, *supra*, 24 Cal.4th at p. 361.)

Second, appellants argue that an inference can be drawn that LADWP's proffered reasons are false because LADWP did not produce any contemporaneous documentation

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[3] Although appellant's reply brief makes such arguments with respect to Lau's e-mail, we do not consider arguments made for the first time in a reply brief. (*Reed v. Mutual Service Corp.* (2003) 106 Cal.App.4th 1359, 1372, fn. 11.) Even if we did so, we would agree with the trial court that the e-mail was inadmissible on the grounds of hearsay and lack of authentication.

or evidence that the elimination of Clifford Higa's position was part of a "reorganization plan." But LADWP produced written documentation that since at least 2003 it had been looking at ways to centralize functions and simplify the organizational structure. Moreover, in July 2005, when appellant Martinez spoke to Kent Noyes about the decision not to backfill Higa's position, he was shown an organizational chart previously prepared by Tom Casey which showed two PCEDT "B" positions in Distribution Drafting. Appellants' reliance on *McGinest v. GTE Service Corp.* (9th Cir. 2004) 360 F.3d 1103 is misplaced. There, the court questioned how a company the size of GTE would have no written evidence of a company-wide hiring freeze. But the "reorganization" here involved one small part of LADWP. Appellants acknowledged that elimination of positions is not unprecedented within LADWP.

Third, appellants point out that evidence showing the employer discriminated against other similarly situated employees may be admissible to show a pattern of discrimination against persons in plaintiff's protected class, citing *Spulak v. K Mart Corp*. (10th Cir. 1990) 894 F.2d 1150, 1156 ["As a general rule, the testimony of other employees about their treatment by the defendant is relevant to the issue of the employer's discriminatory intent"].) In this regard, appellants rely on the deposition testimony of Mendoza, Victor Perez and Fernando Pardo. But, once again, appellants ignore the fact that this testimony was ruled inadmissible by the trial court and appellants do not present arguments showing that this ruling was an abuse of discretion.

Fourth, appellants argue that pretext may be shown through "comparative evidence" that the employer treated other employees outside the protected group more favorably than it treated plaintiff, citing *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 804. Appellants assert that Tom Casey's temporary appointment to the "A" position after David Bannon's retirement gave him an unfair advantage and that the interview process was skewed in his favor. But neither assertion withstands scrutiny. LADWP presented evidence that Casey's temporary appointment was authorized under Article 33 of the MOU, and that he had spent the majority of his employment in the drafting room and had served as Bannon's assistant during the four years preceding

Bannon's retirement. The temporary appointment of Casey thus appears to have been completely logical. Appellants' additional assertion that nearly all of the technical questions asked during the interview played to Casey's knowledge because they related to technical aspects of a system known as GIS is not supported by the evidence. Mendoza testified that, other than one question asking him to explain what GIS is, he could not remember any specific questions asked during the interview. Moreover, a review of the questions actually asked during the interviews shows that GIS-related questions were minimal and generally referred to GIS systems in general. Furthermore, the bid notice for the position specified that knowledge in GIS would be part of the evaluation criteria. In *Guerrero v. Ashcroft* (7th Cir. 2001) 253 F.3d 309, 314, the court found it was not discriminatory to focus on only one set of skills where the job listing specified both operational and administrative skills, since it was up to the employer to determine which set of skills was most valuable for the position.

Finally, appellants claim they presented evidence of pretext in the form of statistical evidence showing that Hispanics were underrepresented at the higher supervisory and management levels. Appellants presented an Equal Opportunity Services report and an analysis purportedly performed by an LADWP employee, and also relied on the deposition testimony of Mendoza and Fernando Pardo. But, again, appellants ignore that this evidence was ruled inadmissible and they do not present arguments in their opening brief challenging that ruling.

In short, we conclude that appellants failed to produce "specific" and "substantial" evidence to create a triable issue as to whether LADWP intended to discriminate. The trial court's grant of summary judgment on appellants' claim for discrimination based on disparate treatment was therefore proper.

C. Retaliation

Appellants contend that they established a prima facie case of retaliation sufficient to proceed with their retaliation claim. We disagree.

Under FEHA, it is an unlawful employment practice for an employer to retaliate against an employee for opposing any discriminatory practices forbidden by FEHA or because the employee has filed a complaint, testified, or assisted in any proceeding under FEHA. (Gov. Code, § 12940, subd. (h).) To establish a prima facie case of retaliation, "a plaintiff must show (1) he or she engaged in a 'protected activity,' (2) the employer subjected the employee to an adverse employment action, and (3) a causal link existed between the protected activity and the employer's action. [Citations.]" (*Yanowitz, supra*, 36 Cal.4th at p. 1042; *Arteaga, supra*, 163 Cal.App.4th at p. 356.)

1. Protected Activity

An employee's formal or informal complaints to a supervisor regarding unlawful discrimination is a "protected activity" and adverse actions taken against the employee after such complaints may constitute retaliation. (*Passantino v. Johnson & Johnson Consumer Prod., Inc.* (9th Cir. 2000) 212 F.3d 493, 506.) While the employee need not explicitly inform the employer he believes the conduct to be discriminatory, "complaints about personal grievances or vague or conclusory remarks that fail to put an employer on notice as to what conduct it should investigate will not suffice to establish protected conduct." (*Yanowitz, supra*, 36 Cal.4th at p. 1047.)

Appellants argue that they engaged in protected activity because they complained to LADWP supervisors Chin Chang, Fernando Pardo and Kent Noyes "regarding the evident racial discrimination with the decision not to backfill Cliff Higa's position." They rely in part on Chang's and Mendoza's deposition testimony. When asked in his deposition whether Mendoza had said he believed he was subject to discrimination, Chang replied, "He mentioned it to me." But appellants once again ignore that this deposition testimony was ruled inadmissible by the trial court. Mendoza's deposition testimony that he may have informally discussed a culture of discrimination with Chang and Pardo was also ruled inadmissible.

While Martinez spoke with Kent Noyes in July 2005 and expressed his concern that the reasons stated in Lau's e-mail as to why Higa's position was not backfilled were

incorrect, he admitted in his deposition testimony that he did *not* complain to Noyes during this conversation about discrimination. The trial court correctly determined that there was nothing in Martinez's comments that would have put LADWP on notice of a complaint of discrimination.

The trial court also concluded that Martinez created a triable issue of fact as to whether he engaged in protected activity through his deposition testimony that he commented to Pardo that he thought Casey would be awarded the PCEDT "A" position because of his race. We disagree. A review of Martinez's testimony shows that he testified that he *thought* the conversation was with Pardo, but he could not recall exactly; he could not recall when the conversation took place; the conversation may have occurred before David Bannon retired; it was just a "general" comment in a "general" conversation that was not specifically about Bannon's position; and "I don't think I was really concerned—actually, I was more interested in Cliff Higa's position." We find this testimony to be too speculative and vague to create a triable issue of fact as to whether Martinez engaged in protected activity. In our opinion, the only protected activities engaged in by appellants were the grievances filed on behalf of Mendoza on September 28, 2005 and on behalf of both appellants on October 31, 2005 alleging discrimination, and the DFEH charges filed in January 2006. In any event, appellants still had the burden of showing that they were subjected to adverse employment action and that there was a causal connection between their activities and LADWP's action.

2. Adverse Employment Action

A claim of retaliatory conduct requires adverse employment action that is "both detrimental and substantial." (*Thomas v. Department of Corrections* (2000) 77 Cal.App.4th 507, 511.) "'A materially adverse change might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation.'" (*Ibid*.) "Minor or relatively trivial adverse actions or conduct by employers or fellow employees

that, from an objective perspective, are reasonably likely to do no more than anger or upset an employee cannot properly be viewed as materially affecting the terms, conditions, or privileges of employment and are not actionable . . . ." (*Yanowitz, supra*, 36 Cal.4th at p. 1054.)

Appellants claim that Mendoza suffered the following adverse employment actions: He was physically and organizationally moved to Distribution Drafting; his support staff was taken away; some of his responsibilities were taken away; and he suffered a delay in receiving a cash award under the "Bright Idea" incentive program. But the evidence showed that Mendoza's physical move simply required him to move his office from one part of the same floor of the building to another. With respect to his organizational move, Mendoza put forth no evidence that he suffered any loss of wages or benefits, that he was given a change in his title, or that he suffered any "significant diminished material" responsibilities. Rather, the evidence showed that he gained some responsibilities. Moreover, the evidence also showed that his support staff was taken away *a year before* Mendoza was moved into Distribution Drafting. In *Harlston v. McDonnell Douglas Corp*. (8th Cir. 1994) 37 F.3d 379, 383, reassignment to another secretarial position, with no change in title, pay or benefits, was not a "materially significant disadvantage," even though some job duties were changed.

With respect to the delay in receiving a cash award under the "Bright Idea" incentive program, the trial court correctly found that such action could not serve as a substantial and material adverse action because the problems receiving the award began in 2003 and Mendoza eventually received the full award.

Appellants' opposition to the summary judgment motion made no arguments as to what adverse employment action Martinez had suffered, other than to state that Martinez was notified in July 2005 that he would be moving physically and organizationally into Distribution Drafting. But as of the date of the summary judgment motion, no such move had taken place. A "threat" of a move is not a material adverse change in employment. (*McRae v. Department of Corrections & Rehabilitation* (2006) 142 Cal.App.4th 377, 392–393 [proposed suspension, which never materialized, was not actionable]; *Hollins v.*

Atlantic Co., Inc. (6th Cir. 1999) 188 F.3d 652, 662 [threat to terminate was not actionable].)

Accordingly, appellants failed to present evidence showing that they suffered any adverse employment action.

3. Causal Link

"It is not enough that the plaintiff prove an employment decision has a substantial and detrimental effect on the terms and conditions of his or her employment. The employee also must show that the decision is linked to the employee's protected activity. For purposes of making a prima facie showing, the causal link element may be established by an inference derived from circumstantial evidence. A plaintiff can satisfy his or her initial burden under the test by producing evidence of nothing more than the employer's knowledge that the employee engaged in protected activities and the proximity in time between the protected action and the allegedly retaliatory employment decision." (*McRae v. Department of Corrections & Rehabilitation*, *supra*, 142 Cal.App.4th at p. 388.) Thus, to establish the requisite nexus, the protected activity must precede the adverse action. (See *Doe v. Capital Cities* (1996) 50 Cal.App.4th 1038, 1053.)

As discussed above, the only protected activities by appellants was the formal filing of their grievances and DFEH complaints. With the exception of Mendoza's actual move into Distribution Drafting, all of the adverse actions of which he complains occurred before his grievance was filed on September 28, 2005. As to the actual move, Mendoza admitted that at least as early as July 2005, he had been informed of the move. As to Martinez, even if he could rely on a vague comment of discrimination made in a general conversation with someone he thinks was Fernando Pardo, he cannot sustain his burden of proving proximity between the protected activity and any adverse action because he cannot recall when the conversation took place. Moreover, like Mendoza, Martinez was informed that he would be moving to Distribution Drafting in July 2005, which was well before his grievance was filed on October 31, 2005.

Thus, appellants failed to present evidence of a causal link between their protected activity and any purported adverse employment actions.

DISPOSITION

The judgment is affirmed. LADWP is entitled to recover its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.

DOI TODD

We concur:

_____, P. J.

BOREN

_____, J.

CHAVEZ